SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

08/28/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2001-000779

FILED: _____

STATE OF ARIZONA ROGER KEVIN HAYS

v.

DANNY RAY PALMER CRAIG W PENROD

FINANCIAL SERVICES-CCC
MESA CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT

Cit. No. #748869

Charge: 1. DUI-ACTUAL PHYSICAL CONTROL
3. EXTREME DUI-BAC .18 OR HIGHER
4. FAILURE TO STAY IN A SINGLE LANE
5. IMPROPER RT TURN

DOC: 12/03/00 DOB: 01/02/43

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

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This matter has been under advisement since oral argument on July 29, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Phoenix City Court, and the Memoranda submitted by counsel.

On January 3, 2002, Appellant was arrested in the City of Mesa and charged with:

1. Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1);
2. Driving with a Blood Alcohol Content greater than .10 Within 2 hrs of Driving;
3. Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A);
4. Failure to Stay within a Single Lane, a civil traffic matter in violation of A.R.S. Section 28-729.1; and
5. Improper to Right Turn, a civil traffic matter in violation of A.R.S. Section 28-751.1.

Appellant claimed the police did not have a reasonable suspicion to stop his vehicle. The trial court conducted an evidentiary hearing on September 4, 2001. In a written opinion dated September 6, 2001, the trial judge (Hon. Karl C. Eppich) denied Appellant's Motion to Suppress. The parties waived their right to a jury trial and submitted the case to the court on stipulated evidence. Appellant was found guilty or responsible of all charges, except Count 2 (Driving with a Blood Alcohol Content in Excess of .10). A timely Notice of Appeal has been filed by the Appellant in this case.

Appellant first claims that the trial court erred in failing to suppress all evidence gathered after an unreasonable stop of Appellant. Appellant claims that the Mesa Police Officers did not have a "reasonable suspicion" which would justify the stop of Appellant's vehicle. An investigative stop

is lawful if the police officer is able to articulate specific facts which, when considered with rational inferences from those facts, reasonably warrant the police officer's suspicion that the accused had committed, or was about to commit, a crime.[1] These facts and inferences when considered as a whole the ("totality of the circumstances") must provide "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[2] A.R.S. Section 13-3883(B) also provides in pertinent part authority for police officers to conduct a "investigative detention":

> A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation.

A temporary detention of an accused during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment even if the detention is only for a brief period of time.[3] In Whren, the United States Supreme Court upheld the District's Court denial of the Defendant's Motion to Suppress finding that the arresting officers had probable cause to believe that a traffic violation had occurred, thus the investigative detention of the Defendant was warranted. In that case, the police officers admitted that they used the traffic violations as a pretext to search the vehicle for evidence of drugs. The Court rejected the Defendant's claim that the traffic violation arrest was a mere pretext for a narcotic search, and stated that the reasonableness of the traffic stop did not depend upon the

[1] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); State v. Magner, 191 Ariz. 392, 956 P.2d 519 (App. 1998); Pharo v. Tucson City Court, 167 Ariz. 571, 810 P.2d 569 (App. 1990).
[2] United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, (1981).
[3] Whren v. United States, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

actual motivations of the arresting police officers. Probable cause to believe that an accused has violated a traffic code renders the resulting traffic stop reasonable under the Fourth Amendment.[5]

The sufficiency of the legal basis to justify an investigative detention is a mixed question of law and fact.[6] An appellate court must give deference to the trial court's factual findings, including findings regarding the witnesses' credibility and the reasonableness of inferences drawn by the officer.[7] This court must review those factual findings for an abuse of discretion.[8] Only when a trial court's factual finding, or inference drawn from the finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.[9] This court must review *de novo* the ultimate question whether the totality of the circumstances amounted to the requisite reasonable suspicion[10].

In this case the trial judge entered a detailed order denying Appellant's Motion to Suppress. The trial judge stated:

> The court finds that at the time the officer activated his lights to attempt to stop the Defendant, the officer could reasonably suspect, based upon the drifting of the vehicle from its lane of travel, that the Defendant violated A.R.S. Section 28-729.1, which requires that a person drive, as nearly as practicable, entirely within a single lane. This alone was sufficient justification for

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[5] Id.
[6] State v. Gonzalez-Gutierrez, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); State v. Magner, Supra.
[7] Id.
[8] State v. Rogers, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).
[9] State v. Chapple, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.
[10] State v. Gonzalez-Gutierrez, 187 Ariz. At 118, 927 P.2d at 778; State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

> the stop. Furthermore, the officer could lawfully stop the vehicle based upon the weaving and slow speed of the vehicle even if those maneuvers were not, standing alone, violations (citations omitted).
>
> The court also agrees with the State that it may consider the Defendant's driving behavior after the officer activated his lights and siren in assessing the reasonableness of the stop, given the Defendant's failure to submit to the officer's authority (citations omitted). This behavior included additional weaving and a poorly executed right turn, providing further support for the officer's decision to continue to attempt to stop the Defendant (footnote omitted).[11]

This Court determines that a factual basis exists to support the trial court's ruling, and this Court also determines *de novo* that the facts described within the trial judge's ruling do establish a reasonable basis for the Mesa Police officer to have stopped the automobile driven by the Appellant. The trial judge did not err in denying Appellant's Motion to Suppress based upon an alleged lack of "reasonable suspicion" to stop Appellant's vehicle.

The second issue presented in this appeal is whether the trial judge erred in denying Appellant's Motion in Limine/To Suppress the results of the blood analysis performed upon Appellant after his arrest. Both parties stipulated that evidence and arguments from another case (State v. Connie Semback) would constitute the record on this issue. Appellant complains that the State is unable to prove that the phlebotomist who withdrew Appellant's blood was qualified, without resort to hearsay evidence. The phlebotomist who

[11] Order denying Defendant's Motion to Suppress, dated September 6, 2001, at pages 1-2.

performed the blood draw upon Appellant has moved out of the jurisdiction and was not available to testify. The trial judge ruled that hearsay evidence of the phlebotomist's qualifications could be admitted, finding this issue presented a preliminary question of admissibility as described in Rule 104[12] which permits the trial court to consider hearsay evidence.

Most importantly, A.R.S. Section 28-1388(A) provides in part:

> The qualifications of the individual withdrawing blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection.

This Court specifically finds that the trial judge did not err in considering hearsay evidence of the qualifications of the phlebotomist who withdrew Appellant's blood, though that phlebotomist was not able to testify.

IT IS ORDERED affirming the convictions and sentences imposed by the Mesa City Court.

IT IS FURTHER ORDERED remanding this matter back to the Mesa City Court for all further and future proceedings in this case.

[12] Arizona Rules of Evidence.